A **RIZANA MOHAMAD DAUD**

v.

NALURI CORPORATION BHD

B HIGH COURT MALAYA, KUALA LUMPUR
VT SINGHAM J
[CIVIL SUIT NO: 22NCVC-273-2011]
12 MARCH 2012

C ***EMPLOYMENT:*** *Contract of employment - Terms and conditions of service - Employee gave employer three months' notice of resignation as provided in contract - Whether compensation payable to employee - Whether employee's suit against employer for compensation time-barred - Whether time computed from date of resignation letter or after expiry of*
D *three months' notice - Whether employer's conduct gave employee legitimate expectation compensation would be paid*

LIMITATION: *Contract - Accrual of cause of action - Notice of termination of employment - Claim for compensation - Whether time-barred - Limitation Act 1953, s. 6(1)(a)*
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The plaintiff's instant claim against the defendant was for payment of RM1,469,774.04 with interest from 15 April 2005, as compensation payable to her upon cessation of her employment with the defendant as its Head of Legal/Corporate Secretarial
F ('the post'). Her claim was premised upon cl. 18 of her contract of employment which provided that compensation was payable upon cessation of employment "for any reason whatsoever" and that it would be a lump sum cash payment equivalent to 36 months' total emoluments. By letter dated 14 January 2005,
G the plaintiff gave the defendant three months' notice of her resignation from the post as provided for under cl. 18, informed the company that she was utilising her leave entitlement of 47 days during the notice period; and requested the defendant to fulfill its obligations under the employment contract. The defendant
H unreservedly accepted her resignation. When there was no response to a further letter by the plaintiff to settle the compensation amount and other claims, her solicitors issued a letter of demand to the defendant. In the court, the defendant disputed the plaintiff's claim *inter alia* on the grounds that: (i) it
I was time-barred under s. 6 of the Limitation Act 1953 ('the Act') if time was computed from the date of her resignation letter; (ii) she did not have formal legal qualifications to occupy the post and neither was her appointment to it approved by the

defendant's Board of Directors; (iii) the compensation claimed was excessive, unconscionable and unenforceable; and (iv) the former directors of the defendant had breached their fiduciary duties by appointing the plaintiff to the post and the defendant was entitled to claim indemnity from them in respect of her claim. It was alleged that the plaintiff was appointed to the post when her husband was a director of the defendant and her brother-in-law was its Chairman.

Held (allowing plaintiff's claim with costs; ordering compensation payable to be assessed by Registrar and assessed sum to bear interest at 8% per annum from 15 April 2005 till date of judgment and thereafter at 4% till date of realisation):

(1) The plaintiff was entitled to the compensation under cl. 18 upon cessation of her employment "for any reason whatsoever". She ceased to be employed by the defendant not on the date of her notice of termination (14 January 2005) but upon the expiry of the three months period given under the notice which would be after 14 April 2005. The defendant had continued to pay her salary until 14 April 2005 and she was on paid leave. The plaintiff's claim which was filed on 6 April 2011 was therefore not time-barred under s. 6(1)(a) of the Act. (paras 12 & 14)

(2) The defendant unreservedly accepted the plaintiff's resignation letter and never denied or disputed her claims for compensation. The defences and arguments raised by the defendant were an afterthought and an attempt to deprive and deny the plaintiff of her legitimate claim. (paras 12, 18 & 19)

(3) By its conduct, the defendant was presently not permitted to raise or contest the plaintiff's qualifications and the amount of salary she was paid from the time of her appointment as Head of Legal/Corporate Secretarial. The plaintiff continued to hold the post until she ceased employment and the defendant had continued to pay her salary until then. There was no evidence of any objection raised about the plaintiff's post or about her salary and benefits by the previous Board of Directors or by Pengurusan Danaharta Nasional Berhad, which took over control and management of the defendant for two years, or by the new Board of Directors who took over thereafter. (para 17)

(4) Article 91 of the defendant's Articles of Association did not require the approval of the Board of Directors to appoint the plaintiff as its Head of Legal/Corporate Secretarial. (para 26)

(5) The defendant did not file any counterclaim to challenge the plaintiff's appointment to the post or the terms of her contract of employment or the compensation demanded by her. Despite allegations that the former directors of the defendant had breached their fiduciary duties in entering into the contract of employment with the plaintiff, no claim for indemnity or third party proceedings were taken against them by the defendant. The defendant's conduct and silence gave the plaintiff a legitimate expectation of receiving the compensation without contest and its present attempt to deprive her of it was inconsistent, inequitable and unjust. (paras 20 & 21)

Case(s) referred to:

Abdul Aziz Abdul Hamid & Yang Lain lwn. Perak Roadways Bhd [2007] 7 CLJ 161 HC ***(refd)***

American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA ***(refd)***

Bank of Credit and Commerce International SA v. Ali [2002] 1 AC 251 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Broome v. Pardess Co-operative Society of Orange Grows Ltd [1940] 1 All ER 603 ***(refd)***

Cheah Cheng Hoc v. PP [1986] 1 CLJ 169; [1986] CLJ (Rep) 84 SC ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***

CIMB Bank Bhd v. Ng Lee Lian & Anor And Another Case [2011] 10 CLJ 116 HC ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Daishowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd [1980] 1 LNS 14 FC ***(refd)***

Datin Maznah Muhamat v. Ketua Pengarah Hasil Dalam Negeri [2001] 1 LNS 167 ***(refd)***

De Bussche v. Alt (1878) 8 Ch D 286 ***(refd)***

Director General of Inland Revenue v. Highlands Malaya Plantations Ltd [1988] 1 LNS 145 SC ***(refd)***

Director General of Inland Revenue v. R [1975] 1 LNS 32 FC ***(refd)***

Dirkje Pieternella Halma v. Mohd Noor Baharom & Ors [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99 SC ***(dist)***

Duke of Leeds v. Earl of Amherst (1846) 2 Ph 117 ***(refd)***

Fender v. St John Mildmay [1938] AC 1 HL ***(refd)***

Griffith v. Paget [1877] 6 Ch D 511 ***(refd)***

Guiness Plc v. Saunders [1990] 1 All ER 652 ***(refd)***
Hannes v. MJH Pty Ltd [1992] 7 ACSR 8 ***(refd)***
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***
Hogg v. Scott LR 18 Eq 444 ***(refd)***
HSBC Bank Malaysia Berhad v. Impressions Sdn Bhd & Ors [2010] 1 LNS 205 HC ***(refd)***
Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***
Irvine v. Union Bank of Australia [1877] 2 App Cas 366 ***(refd)***
Kgn Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lim Kar Bee v. Abdul Latif Ismail [1977] 1 LNS 64 FC ***(refd)***
Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Ptd Lte [1995] 1 SLR 499 ***(refd)***
Mahony v. East Holyford Mining Co [1874-1880] All ER Rep 427 ***(refd)***
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC ***(refd)***
Mayban Securities Sdn Bhd v. Mustafa Johan Abdullah [2006] 1 LNS 250 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Nik Che Kok v. Public Bank Bhd [2000] 2 CLJ 157 CA ***(refd)***
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***
Pritchard v. Arundale [1971] 3 All ER 1011 ***(refd)***
Re Comptoir Commercial Anversois and Power, Son & Co [1920] 1 KB 868 ***(refd)***
Re Law Puong Ung Lee Chuan Hong Sdn Bhd v. Law Puong Ung [1980] 1 LNS 126 FC ***(refd)***
Re W & M Roith Ltd [1967] 1 All ER 427 ***(refd)***
Reigate v. Union Manufacturing Co Ltd and Elton Ramsbottom/Cop Dyeing Co Ltd [1918] 1 KB 592 ***(refd)***
RHB Capital Bhd v. Tan Sri Dato' Abdul Rashid Hj Mohamed Hussain [2006] 2 CLJ 91 HC ***(refd)***
Royal British Bank v. Turquand [1843-60] All ER Rep 435 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Tamplin (FA) Steamship Co Ltd v. Anglo American Petroleum Products Co Ltd [1916] 2 AC 397 ***(refd)***
Tan Kong Min v. Malaysian National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***

A *Theresa Chong v. Kin Khoon & Co [1976] 1 LNS 165 FC* ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 2 All ER 260 ***(refd)***
Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd [1993] 3 CLJ 188 HC ***(refd)***
B *Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1131; [1990] 1 CLJ (Rep) 330 SC* ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***
Yusri Pialmi v. PP [2010] 6 CLJ 878 FC ***(refd)***

C **Legislation referred to:**
Civil Law Act 1956, s. 11
Companies Act 1965, ss. 20(1), 137
Contracts Act 1950, s. 26
Employment Act 1955, s. 60E
Limitation Act 1953, s. 6(1)(a)
D Rules of the High Court 1980, O. 37 r. 1

For the plaintiff - KM Chan; M/s Lim Kian Leong & Co
For the defendant - Dato' Ben Chan (Keith Yeoh with him); M/s Mah-Kamariyah & Philip Koh

E *Reported by Ashok Kumar*

JUDGMENT

F **VT Singham J:**

The Statement Of Claim

[1] The plaintiff's claim against the defendant as per the
G statement of claim dated 6 April 2011 (encl. 2) is for the sum of RM1,469,774.04 being the compensation payable upon cessation of employment as the Head of Legal/Corporate Secretarial of the defendant company pursuant to the terms as provided in cl. 18 of the letter of appointment dated 7 August 2002 (hereinafter
H referred to as "the contract of employment"). The plaintiff was formerly employed by the defendant as the Head of Legal/ Corporate Secretarial of the defendant under the contract of employment dated 7 August 2002. However, the plaintiff had by the letter dated 14 January 2005 exercised her option to terminate
I the contract of employment by giving three months notice to the defendant by tendering her resignation as provided in cl. 18 of the said contract of employment.

Clause 18 of the contract of employment dated 7 August 2002 provides that:

Resignation Notice	:	**the employment may be terminated by either party giving three months notice** (emphasis added)
Cessation of employment as the Head of Legal/ Corporate Secretarial	:	Cessation of employment as Head Legal/Corporate Secretarial **for any reason whatsoever, including the following shall entitle you to compensation**: (emphasis added) (i) Revised offer and terms and conditions of employment of which are lesser than present package and are not mutually agreeable (ii) Termination (iii) Removal from position as the Head of Legal/Corporate Secretarial, which shall automatically terminate your employment (iv) Resignation from employment due to change in any major shareholder; change in at least 1/3 composition of the board including the chairman; and other (v) Constructive dismissal (vi) Cessation, by way of removal or otherwise, which shall automatically terminate your employment as the Head of Legal/Corporate Secretarial **The compensation shall be a lump sum cash payment equivalent to 36 months' total emoluments**. The monthly emoluments shall be

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calculated based on your average monthly emoluments over the immediately preceding period of up to 12 months. (emphasis added)

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Upon cessation of employment, you shall also be entitled to purchase the company's car used by you at the next

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book value and to have the corporate club membership transferred to you at a price of RM10.00.

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[2] Hence, the plaintiff claims against the defendant for:

(i) the sum of RM1,469,774.04 being the compensation payable, due and owing to the plaintiff;

(ii) In the alternative, an assessment of the compensation in

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accordance with cl. 18 of the employment contract (the assessed amount);

(iii) An order that the defendant to pay to the plaintiff the assessed amounts due under prayer 2 above;

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(iv) Interest on the said sum of RM1,469,774.04 or the assessed amounts at the rate of 8% per annum from 15 April 2005 until the date of judgment;

(v) Interest on the said sum of RM1,149,774.04 or the assessed

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amounts at the rate of 8% per annum till the date of realisation in full;

(vi) Costs; and

(vii) Such further or other orders as this Honorable Court thinks

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fit.

The Statement Of Defence

[3] On the other hand, by the statement of defence, the

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defendant has pleaded, *inter alia* and briefly, as follows:

(a) The plaintiff is the wife to one Bistamam Ramli, the then Director of the defendant and also the sister-in-law to one Tan Sri Dato' Tajuddin Ramli, the then Chairman of the defendant;

(b) There was no document to prove that the plaintiff's appointment as the Head of Legal/Corporate Secretarial were approved by the Board of Directors of the defendant; (the contract of employment was signed by Tan Sri Saw Huat Lye, the Executive Director of the defendant company at the material time);

(c) The plaintiff does not have formal legal qualifications to hold the post as the Head of Legal/Corporate Secretarial;

(d) The alleged compensation is unconscionable, too excessive and/or failure of consideration and unenforceable in law. The alleged compensation was not approved by the Board of Directors of the defendant;

(e) The plaintiff's claim does not fall under any of the circumstances in cl. 18 of the letter of employment;

(f) The plaintiff has not tendered three months notice of resignation to the defendant;

(g) The plaintiff is not entitled to the alleged emoluments;

(h) The plaintiff's claim is barred by virtue of s. 6 of the Limitation Act 1953;

(i) The former directors of the defendant have breached their fiduciary duties in entering into the letter of appointment with the plaintiff. Therefore, the defendant is entitled to claim for indemnity from the former directors of the defendant in respect of the plaintiff's alleged claim.

[4] The statement of agreed facts (encl. E) is as follows:

(a) The defendant executed a letter of appointment with the plaintiff dated 7 August 2002 subject to the terms and conditions stipulated therein.

(b) The plaintiff tendered her resignation *via* a letter dated 14 January 2005.

(c) By the letter dated 20 January 2005, the defendant accepted the plaintiff's resignation.

(d) By the letter dated 31 January 2005 the plaintiff requested the defendant to make necessary arrangements to fulfill its contractual obligations under cl. 18 of the letter of appointment.

(e) The plaintiff was paid a salary of RM20,000 per month.

(f) The plaintiff was allowed club membership and reimbursement of membership fee as per the terms of the letter of appointment.

(g) The plaintiff was allowed reimbursement of club expenses up to RM1,000 per month.

(h) The defendant contributed 12 percent of the salary as the employer's contribution towards the Employees Provident Fund.

(i) The plaintiff was allowed personal accident coverage and group term life insurance during the term of her employment with the defendant.

(j) The plaintiff was provided a company car and driver during the term of the employment.

(k) The plaintiff was paid her last salary on 22 April 2005 under a letter signed by the defendant's head of finance, being salary from 1 April 2005 to 14 April 2005.

(l) On 15 April 2005, the defendant through its Executive Director, Lee Sze Siang, acknowledged receipt of the hand over by the plaintiff of the items mentioned in that letter.

(m) The plaintiff through her solicitors Messrs Vazeer Akhbar Majid & Co issued a letter of demand dated 7 April 2008 to the defendant.

[5] The issues to be tried (encl. F) as agreed by both the parties is as follows:

(a) Whether the plaintiff's claim is time-barred by virtue of s. 6(1)(a) of the Limitation Act 1953?

(b) Whether the plaintiff's appointment and/or the alleged compensation in cl. 18 of the letter of appointment dated 7 August 2002 (letter of appointment) was required in law to be approved by the Board of Directors of the defendant?

(c) If the answer to question (b) above is in the affirmative, whether the plaintiff's appointment and/or the alleged compensation in cl. 18 of the letter of appointment dated 7 August 2002 (letter of appointment) were approved by the Board of Directors of the defendant?

(d) Whether the alleged compensation in cl. 18 of the letter of appointment is unconscionable, too excessive and/or failure of consideration and unenforceable in law? A

(e) Whether cl. 18 of the letter of appointment applied where the plaintiff had resigned pursuant to her letter of resignation dated 14 January 2005? B

(f) Whether cl. 18 of the letter of appointment was for the proper purpose of the defendant or for a collateral purpose and unenforceable in law? C

(g) What would amount to 'emoluments' as stated in cl. 18 of the letter of appointment?

(h) Whether the plaintiff has committed inordinate, unreasonable and inexcusable delay in enforcing her purported rights, if any, and hence her purported rights are unenforceable in law? D

(i) Whether the plaintiff is entitled to claim full interest in the manner as prayed?

[6] In support of the plaintiff's claim, learned counsel for the plaintiff has submitted, *inter alia*, and briefly, as follows: E

(a) In a suit for default payment under an agreement, the cause of action accrues when a notice of demand is issued and there is a failure to comply with it within the stipulated time. F

(b) The Executive Director of the defendant has the authority to execute the contract of employment. Further, salaries and other benefits were subsequently paid to the plaintiff pursuant to the letter of appointment and there is no express provision in the Article of Association which states for the requirement of the approval of the Board of Directors before a person could be appointed as the Head of Legal/Corporate Secretarial. The plaintiff need not concern herself or inquire into the regularity of the internal affairs of the defendant company. The defendant had failed to produce any document to show that the plaintiff's appointment was flawed and therefore is an afterthought. G H

(c) The plaintiff's lack of legal qualification to hold the post as the Head of Legal/Corporate Secretarial was made in isolation and not to support any allegation of misrepresentation or breach I

capable to invalidate the plaintiff's claim for the compensation. If there was requirement of legal qualification, the requirement has been waived by the defendant's conduct.

(d) The defendant's allegation that the compensation was unconscionable, excessive and without consideration is bound to fail.

(e) The list of situation set out in cl. 18 of the letter of appointment is not exhaustive.

(f) On the issue of public policy, there are no reported cases striking down such contractual severance payments payable to the employees, in the present case, to the plaintiff.

(g) The company has not offered any valid rhyme or reason to reject the claim and accordingly, the amount ought to be paid to the plaintiff as claimed.

[7] In support of the plaintiff's claim and his submissions, learned counsel for the plaintiff has referred to the following authorities:

(a) *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825

(b) Section 60E of the Employment Act 1955

(c) *CIMB Bank Bhd v. Ng Lee Lian & Anor And Another Case* [2011] 10 CLJ 116

(d) *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126

(e) Section 20(1) of the Companies Act 1965

(f) *HSBC Bank Malaysia Berhad v. Impressions Sdn Bhd & Ors* [2010] 1 LNS 205

(g) *Datin Maznah Muhamat v. Ketua Pengarah Hasil Dalam Negeri* [2001] 1 LNS 167

(h) Section 26 of the Contracts Act 1950

(i) *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283

(j) *Mayban Securities Sdn Bhd v. Mustafa Johan Abdullah* [2006] 1 LNS 250

(k) Section 137 of the Companies Act 1965

(l) *RHB Capital Bhd v. Tan Sri Dato' Abdul Rashid Hj Mohamed Hussain* [2006] 2 CLJ 91

[8] On the other hand, in disputing the plaintiff's claim, learned counsel for the defendant has submitted, *inter alia*, and briefly, is as follows:

(a) Throughout the plaintiff's working life, she was attached to no other companies except those controlled by her brother-in-law and her spouse and persons associated with them. The evidence shows that her full time employment with the defendant was closely connected following her resignation as secretary to Malaysian Airlines System (MAS) in February 2001 and removal of her as secretary to Technology Resources Industries Bhd (TRI) on 4 July 2002. She was out of job then, thereafter, she commenced work with the defendant on 7 August 2002 as the Head of Legal/Corporate Secretarial.

(b) The 'standard terms and conditions' (exh. P19) was deliberately suppressed by the plaintiff.

(c) The time began to run on 14 January 2005, when the plaintiff tendered her letter of resignation to the defendant. On that day, there was in existence a party who could sue and time should began to run from the earliest time at which an action could be brought. The last day for the plaintiff to file her claim under the purported cl. 18 was 13 January 2011. As the writ was filed on 6 April 2011, her claim is time-barred by virtue of s. 6 of the Limitation Act 1953.

(d) Being the secretary to the defendant, the plaintiff had full knowledge of Article 91 of the Article of Associations. She would have or ought to have been aware that the Tan Sri Saw, the Executive Director of the defendant company alone did not possess implied, actual or ostensible authority to grant her the term and conditions contained in the purported cl. 18 without the approval of the board.

(e) The cl. 18 listed down the happening of six specific individual events upon which the lump sum cash payment is available. The plaintiff did not state in her letter of resignation which ground has she relied upon her resignation. Clause 18 does not apply where the plaintiff resigned for her personal reason or resignation *simpliciter*.

A (f) The cl. 18 was not reasonably incidental to the carrying on of the defendant's business, it was not entered in *bona fide* for the benefit of and to promote the prosperity of the defendant. The effect is opposite.

B (g) The plaintiff had failed to prove the contents in the summary mentioned in the para. 7 of the statement of claim. The meaning of 'emoluments' applies differently to different circumstances. The purported cl. 18 cannot be intended to apply to items payment for which were subject to the C discretion of the company.

(h) Clause 18 of the letter of appointment is contrary to the public policy.

(i) The plaintiff's claim should be dismissed with costs.

D **[9]** In support of his submissions, learned counsel for the defendant has referred to the following authorities:

(i) Pengurusan Danaharta Nasional Berhad Act 1998

E (ii) *Cheah Cheng Hoc v. PP* [1986] 1 CLJ 169; [1986] CLJ (Rep) 84

(iii) Section 6 of the Limitation Act 1953

F (iv) *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332

(v) *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69

G (vi) *Abdul Aziz Abdul Hamid & Yang Lain lwn. Perak Roadways Bhd* [2007] 7 CLJ 161

(vii) *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504

(viii) *Shorter Oxford English Dictionary*

H (ix) *Nasri v. Mesah* [1970] 1 LNS 85

(x) *Nik Che Kok v. Public Bank Bhd* [2000] 2 CLJ 157

(xi) *Re Law Puong Ung Lee Chuan Hong Sdn Bhd v. Law Puong* I *Ung* [1980] 1 LNS 126

(xii) *Director General of Inland Revenue v. Highlands Malaya Plantations Ltd* [1988] 1 LNS 145

(xiii) *Royal British Bank v. Turquand* [1843-60] All ER Rep 435

(ix) *Irvine v. Union Bank of Australia* [1877] 2 App Cas 366

(xv) *Mahony v. East Holyford Mining Co* [1874-1880] All ER Rep 427

(xvi) *Griffith v. Paget* [1877] 6 Ch D 511

(xvii) *Guiness Plc v. Saunders* [1990] 1 All ER 652

(xviii) *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, SC

(ixv) *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330

(xx) *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357

(xxi) *Yusri Pialmi v. PP* [2010] 6 CLJ 878

(xxii) *Re W & M Roith Ltd* [1967] 1 All ER 427

(xxiii) *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1

(ivxx) *Daishowa (M) Wood Products Sdn Bhd v. Kepong Wood Products Co Sdn Bhd* [1980] 1 LNS 14

(xxv) Civil Law Act 1956

(xxvi) *Lim Kar Bee v. Abdul Latif Ismail* [1977] 1 LNS 64

(xxvii) *Hannes v. MJH Pty Ltd* [1992] 7 ACSR 8

(xxviii) *Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Ptd Lte* [1995] 1 SLR 499

(xxiv) *Theresa Chong v. Kin Khoon & Co* [1976] 1 LNS 165

(xxx) *Fender v. St John Mildmay* [1938] AC 1 HL

A **Decision**

[10] Having heard and seen the witnesses giving evidence and having examined and considered the totality of the evidence with the documents produced by both the parties and admitted, in
B particular, cl. 18 of the contract of employment and upon considering the submissions with the authorities and the research carried out by this court, the decision of this court is:

(a) This court finds that the plaintiff's pleaded case is that she had by the letter dated 14 January 2005 terminated the
C contract of employment by tendering her resignation as the Head of Legal/Corporate Secretarial by giving three months notice to the defendant.

(b) By the letter dated 14 January 2005, the plaintiff has expressly
D stated that she was exercising her right as provided under cl. 18 of the contract of employment by giving three months notice to terminate the contract whereby she would resign from the employment. In other words, this is a case where the plaintiff had decided to terminate the contract of employment
E by tendering her resignation which eventually would result in cessation of her employment as the Head of Legal/Corporate Secretarial.

(c) As the terms of the contract of employment expressly provides
F that the employment may be terminated by either party giving three months notice, this court is of the considered view that the parties ie, the plaintiff and the defendant have agreed that either party has the option to terminate the contract of employment, ie, the defendant may terminate the plaintiff's
G employment by giving three months notice to the plaintiff. Likewise, the plaintiff may also terminate the contract of employment by tendering her resignation by giving three months notice which she had exercised as provided in cl. 18 of the contract of employment.

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[11] Basically, there are *inter alia* two substantial issues in the present case, first, whether the plaintiff's claim is time-barred by virtue of s. 6 of the Limitation Act 1953. Secondly, whether the plaintiff is entitled to the compensation which is equivalent to
I 36 months of the total emoluments upon the plaintiff having exercised her option to terminate the contract of employment dated 7 August 2002 by tendering her resignation to the defendant as provided in cl. 18 thereof. For easy reference, the contract of employment dated 7 August 2002 is reproduced:

7 August 2002

Rizana Mohamad Daud
No. 2 Jalan 16/7A
46350 Petaling Jaya
Dear Puan Rizana

APPOINTMENT AS THE HEAD OF LEGAL/CORPORATE SECRETARIAL

We are pleased to confirm your employment as the Head of Legal/Corporate Secretarial of Naluri Berhad ("Naluri" or "Company") and the Group.

We are also pleased to confirm your position as the Company Secretary of Naluri Berhad with effect from 22 January 1996. Your appointment as the Company Secretary shall be in accordance with the Articles of Association of the Company.

As an incentive for you to enter into full time employment of the Company. Naluri is pleased to offer you as the Head of Legal/ Corporate Secretarial of Naluri Berhad ("Naluri" or "Company") and the Group, the following terms and conditions:

1. EFFECTIVE DATE OF EMPLOYMENT	:	Your employment with Naluri Berhad and Group will be deemed to have commenced from the date you were first appointed the Secretary of the Company, which was on 22 January 1996.
2. REPORTING	:	You shall report to the Chairman of the Board and in his absence, to the Executive Director of the Company.
3. BASE SALARY	:	You will be paid a basic salary of RM20,000.00 per month, subject to annual reviews. Your next annual review shall be 31 December 2002.
4. BONUS AND PERFORMANCE INCENTIVE	:	1. Company-wide Bonus You will be entitled to the Company-wide bonus declared by the Board and/or The Management from time to time.

			2. Performance Bonus The Performance Bonus will be based on your individual performance as evaluated by the Executive Director and/or the Chairman of the Board.
			3. Performance Incentive An incentive payment of reasonable value shall be paid to you as and when deemed necessary as determined by the Executive Director and/or the Chairman of the Board.
5.	WORKING HOURS	:	Mondays to Fridays (except for public holidays) 9 a.m. to 5 p.m. inclusive of an hour lunch break
6.	ANNUAL AND MEDICAL LEAVE	:	Annual Leave You will be entitled to 30 working days leave per annum or payment *in lieu* thereof for any unutilized leave. Medical Leave You are entitled to 30 working days per annum / without hospitalization and 60 working days per annum with hospitalization each year. Compassionate Leave 12 working days per annum.
7.	BUSINESS TRAVEL AND EXPENSES	:	Business Class, subject to availability of seat. All business related expenses and costs shall be reimbursed on actual basis.
8.	CORPORATE CREDIT CARD	:	You will be entitled to one (1) corporate credit card.
9.	MOBILE PHONE	:	You will be entitled to the Company's mobile phone of unlimited usage or you may use your personal mobile phone and the Company shall reimburse you of the actual monthly bills including all charges and related expenses.

10.	CLUB MEMBERSHIP	:	One corporate or personal (in your own name or spouse's) club membership to be provided and/ or paid for by the Company for business purpose and/or otherwise, inclusive of payment of the monthly subscription fees and related costs/expenses.
11.	CLUB BILLS	:	The Company shall pay for your bills (usage charges and expenses by you, your spouse and children) up to the amount of RM1,000.00 per month.
12.	ENTERTAINMENT	:	The Company shall pay for all costs, charges and expenses relating to your business entertainments on actual basis.
13.	EMPLOYEES PROVIDENT FUND	:	You will be liable to contribute to the Employees Provident Fund at the prevailing statutory rate, which currently stands at 11% of your basic salary. The Company will contribute to the said Fund at the prevailing statutory rate.
14.	PERSONAL ACCIDENT INSURANCE	:	During the course of your employment with the Company, the Company will pay for your Personal Accident Insurance policy against death and disablement for the amount of RM3.0 million. The policy will cover you around the clock regardless of whether you are exercising your employment at the relevant time or whether you are within or out of Malaysia. In case of death, your legal or nominated beneficiaries shall be entitled to the insurance compensation.

15. GROUP TERM LIFE INSURANCE	:	You will be covered under the Company's Group Term Life Insurance for the amount equivalent to sixty (60) months of your last basic salary. The total amount will be adjusted from time to time with your salary increments or adjustments.	
16. MEDICAL, DENTAL AND OPTICAL	:	You, your spouse and your dependants under the age of eighteen (18) years or those who are still pursuing their education, including tertiary education, will be eligible for unlimited medical, dental and optical treatments including, consultation, hospitalization; surgical, medications and incidentals at all times.	
17. COMPANY CAR AND DRIVER	:	You will be provided with a suitable Company car reflecting the stature of the position. The car should not be less than 2.2 liters and is not more than 2 years of age, to be fully maintained by the Company, including the petrol, repairs and maintenance, insurance, road tax and other costs. The Company shall also pay for the fixed parking bay allocated to you. The Company will provide and pay for all costs of a personal driver of your choice, including overtime, or alternatively the Company will pay you an allowance *in lieu* of a personal driver, as you may agree.	
18. TERMINATION OF EMPLOYMENT	:	Resignation Notice	: **the employment maybe terminated by either party giving three (3) months notice** (emphasis added)

Cessation of employment as the Head of Legal/ Corporate Secretarial	:	Cessation of employment as Head of Legal/ Corporate Secretarial for any reason whatsoever, including the followings shall entitle you to compensation:
		(ii) Revised offer and terms and conditions of employment of which are lesser than present package and are not mutually agreeable
		(ii) Termination
		(vii) Removal from position as the Head of Legal/Corporate Secretarial, which shall automatically terminate your employment
		(viii) Resignation from employment due to change in any major shareholder; change in at least 1/3 composition of the board including the chairman; and other
		(ix) Constructive dismissal

(x) Cessation, by way of removal or otherwise, which shall automatically terminate your employment as the Head of Legal/Corporate Secretarial

The compensation shall be a lump sum cash payment equivalent to 36 months' total emoluments. The monthly emoluments shall be calculated based on your average monthly emoluments over the immediately preceding period of up to 12 months. (emphasis added).

Upon cessation of employment, you shall also be entitled to purchase the company's car used by you at the next book value and to have the corporate club membership transferred to you at a price of RM10.00.

19. OTHER BENEFITS : Refer to the Company's Terms and Conditions of Employment manual and all subsequent amendments thereto. Should there be any discrepancy between the usual or standard Terms and Conditions of Employment of the Company and/or the Group and your letter of employment (which may be revised from time to time), the terms and conditions of your letter(s) of employment shall prevail.

Yours sincerely,
For NALURI BERHAD

sgd
TAN SRI SAW HUAT LYE
EXECUTIVE DIRECTOR

I hereby confirm my acceptance of the above terms and conditions as stated

sgd
Rizana Mohamad Daud
Dated : 9.8.2002

Issue On The Law Of Limitation

[12] On the issue of limitation, this court finds that:

(i) The compensation payable to the plaintiff under cl. 18 of the contract of employment would only arise upon cessation of employment as the Head of the Legal/ Corporate Secretarial which is after 14 April 2005 and not upon the date of the notice of termination dated 14 January 2005.

(ii) The cessation of employment would only arise when the plaintiff is no longer permanently and physically present in the employment of the defendant and upon completion of the three months notice of termination and when the plaintiff is no longer paid her salary.

(iii) By her letter dated 14 January 2005, the plaintiff has stated that she had exercised her right by giving three months notice of termination to resign from the employment as provided in cl. 18 of the contract of

employment where it is stated that the employment may be terminated by either party giving three months notice and that the plaintiff would cease to be employed by the defendant on 14 April 2005.

(iv) The plaintiff had also stated in the said letter dated 14 January 2005 that she would be utilising her leave entitlement of 47 days during the three months notice period.

(v) By the letter of acceptance dated 20 January 2005, the defendant did not contend otherwise or even deny the plaintiff's right to terminate the contract of employment by giving three months notice of her resignation and that her employment would cease on 14 April 2005.

(vi) The defendant did not also deny the plaintiff's entitlement for the compensation when the notice of termination was accepted by the defendant with the remark 'regrets' and 'wish her success and happiness in the future undertakings'. In fact, the defendant had unreservedly accepted the plaintiff's notice of termination of the contract of employment when she tendered her resignation by the notice of termination dated 14 January 2005 and the plaintiff had reminded the defendant to 'fulfil its obligations under the terms of her employment'.

(vii) The plaintiff's claim which was filed in court on 6 April 2011 is not time-barred as the plaintiff is entitled to claim the compensation and she has filed this claim within the period of six years as permitted under the Limitation Act 1953.

> The law of limitation is based on public policy fixing a life span for legal remedy for the purpose of general welfare. It is pointed out that the rules of limitation are not meant to destroy the rights of the parties but are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly and the law of limitation fixes a life span for legal injury suffered and that is enshrined in the maxim '*interest reipublicae ut sit finis litium*' ie, it is for the general welfare that a period be put to litigation and that it is not meant to destroy the rights of the parties but they are meant to see that the party do

not resort to dilatory tactics but seek their remedy promptly because the idea is that every legal remedy must be alive for a legislatively fixed period of time. (*N Balakrishnan v. MA Krishnamurthy* [1998] 7 SCC 123).

(viii) In so far as the cessation of employment, the plaintiff's employment had ceased only upon the expiry of the three months period of the notice of termination dated 14 January 2005 and pursuant to the terms of the contract of employment. In the present case, the plaintiff ceased to be employed after 14 April 2005. She was also paid her salary for the months of January to March 2005 (see exh. P5A-C) after she had terminated the contract of employment by the letter dated 14 January 2005. She was also on paid leave and this is supported by the Income Tax Form EA submitted by the defendant to the Income Tax Department that the plaintiff had ceased employment on 30 April 2005 (see exh. P22). (See also No. 11 of the statement of agreed facts (encl. E)) In other words, the defendant had continued to pay the plaintiff's salary until 14 April 2005 and she was on paid leave unlike the case of *Dirkje Pieternella Halma v. Mohd Noor Baharom & Ors* [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99 where the plaintiff was on 'no pay leave' at the time of the accident.

In *Dirkje Pieternella Halma v. Mohd Noor Baharom & Ors* [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99, the plaintiff who was a qualified registered nurse was not awarded any loss of future earnings as she was on 'no pay leave' at the time of the accident. However, the plaintiff in that case was awarded loss of earning capacity. Whereas, in the present case, the plaintiff was on paid leave until 14 April 2005. Therefore, the plaintiff ceased to be employed only after 14 April 2005 where she would be entitled to be paid the compensation as provided in cl. 18.

(ix) In the present case, this court is in agreement with the submissions of learned counsel for the plaintiff that the plaintiff's claim is not barred by limitation pursuant to s. 6(1)(a) of the said Act. The plaintiff's claim is a straight forward case of the plaintiff exercising her contractual rights to claim the compensation upon cessation of the employment with the defendant which had ceased after 14 April 2005 The plaintiff is protected and has filed her claim well within the six years period as provided under s. 6(1)(a) of the said Act.

A (i) In the circumstances, the defendant's contention that the plaintiff's claim is time-barred by virtue of s. 6 of the Limitation Act 1953 and that the last date for filing this claim was 13 January 2011, is misplaced and cannot be sustained on the facts and in law. Accordingly, the
B contention of inordinate, unreasonable and inexcusable delay in enforcing the plaintiff's rights and it is unenforceable in law cannot be sustained. (see *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 at pp. 150-156).

C

[13] For the sake of convenience and easy reference, it is relevant to reproduce the following correspondences between the plaintiff and the defendant:

D (a) the plaintiff's letter of termination dated 14 January 2005 which includes the request by the plaintiff for the defendant to fulfil the obligations under the terms of the contract of employment;

(b) the defendant's reply dated 20 January 2005 accepting her
E letter of termination dated 14 January 2005;

(c) the plaintiff's letter dated 31 January 2005 requesting *inter alia* for the compensation to be paid;

F (d) By the plaintiff's letter dated 15 April 2005, she had handed over the Digi Simcard for the mobile phone, the motorcar which was given to her for use during her employment and the Petronas petrol card; and

(e) the plaintiff's letter of demand dated 7 April 2008 through her
G solicitors.

(i) the plaintiff's letter of termination dated 14 January 2005 reads:

H Rizana Mohamad Daud
Legal & Corporate Secretarial Department
8th floor Menara TR
161B Jalan Ampang
50450 Kuala Lumpur

I 14 January 2005

YBhg Dato' Sri Adam Sani, Executive Chairman
YBhg Tan Sri Saw Huat Lye, Executive Director
Mr Lee Sze Siang, Executive Director
Naluri Berhad

8th floor Menara TR
l61B Jalan Ampang
50450 Kuala Lumpur

Dear Sirs,

TERMINATION OF EMPLOYMENT

I refer to my Letter of Employment dated 7 August 2002 duly signed by the Executive Director, Tan Sri Saw Huat Lye, a copy whereof is annexed herewith for your ease of reference.

As provided under Clause 18 of my above employment contract, I hereby exercise my rights by giving 3-month notice of resignation from employment with immediate effect, as the terms provided under Clause 18 have been met.

I shall cease to be employed by Naluri Berhad on 14 April 2005, meanwhile I shall be utilising my leave entitlement of 47 days during this notice period.

I would appreciate it if you can make the necessary arrangements for the Company to fulfil its obligations under the terms of my employment.

Thank you.

Yours faithfully

sgd
Rizana Mohamad Daud

(ii) the defendant's reply dated 20 January 2005 reads:

20 January 2005

Puan Rizana Mohamad Daud

Legal & Corporate Secretarial Department
8th Floor Menara TR
151B Jalan Ampang
50450 KUALA LUMPUR

Dear Puan Rizana

TERMINATION OF EMPLOYMENT CONTRACT

We note with regret your letter of resignation dated 14 January 2005.

The management is saddened by your decision in the light of your long association with the company and the renewed resolution to move forward as a company.

Like you we are also concerned for the smooth running of your department and the portfolio of task requiring attention and due care. The management had been moved by your recent memo dated 11 January 2005 that you had interest in the re-organisation of the office and work areas and to work closely with all parties to bring about a better future for the company.

Therefore, in the light of this, your intention to now resign presumably for personal reason is accepted with regret.

We wish you success and happiness in your future undertakings.

Your faithfully
NALURI BERHAD

sgd
Lee Sze Siang

c.c (i) Dato' Seri Adam Sani Abdullah, Chairman
(ii) Tan Sri Saw Huat Lye, Executive Director

(iii) the plaintiff's letter dated 31 January 2005 reads:

Rizana Mohamad Daud
Legal & Corporate Secretarial Department
8th floor Menara TR
161B Jalan Ampang
50450 Kuala Lumpur

31 January 2005

YBhg Dato' Sri Adam Sani, Executive Chairman
YBhg Tan Sri Saw Huat Lye, Executive Director
Mr Lee Sze Siang, Executive Director
Naluri Berhad
8th Floor Menara TR
161B Jalan Ampang
50450 Kuala Lumpur

Dear Sirs,

TERMINATION OF EMPLOYMENT

I refer to my Letter of Termination of Employment dated 14 January 2005 exercising my option in accordance with Clause 18 of my employment contract.

I further refer to your Letter of Acceptance dated 20 January 2005 duly signed by the Executive Director, Mr Lee Sze Siang.

As you are fully aware, the unfolding of events gave me the rights to exercise my option to terminate the employment. This is clearly set out in Clause 18 of my employment contract which was duly signed by the Executive Director, Tan Sri Saw Huat Lye.

Since Clause 18 of the employment contract has taken effect, I would appreciate if the Management could make the necessary arrangements for the Company to fulfil its explicitly stipulated contractual obligations under the terms of my employment before the expiry of my tenure with regard to:

(i) the compensation (Clause 18); and

(ii) the payment of all amounts which are and will be due to me, including my outstanding claims (submitted on 27 December 2004) and all benefits, entitlements and future claims until the expiry of my tenure.

On a final note, I would like to correct the Management's presumption, as stated in the Letter of Acceptance, that I have resigned for "personal reason".

As a matter of fact, after the takeover, the new Management has deliberately:

(i) excluded and sidelined me from being a participant of all matters of the Company and the Group while repeatedly stressing that I remain responsible as the Head of Legal and Corporate Secretarial of Naluri Group;

(ii) made working conditions difficult for me;

(iii) seize all my powers and authorities as the Head of Legal and Corporate Secretarial of Group and also as the Company Secretary of Naluri Berhad and its subsidiaries;

(iv) restrained me from performing my duties and responsibilities; and

(v) caused no assistance and support to be provided to me, including relocating staff under me to a different department.

However, in the best interest of Naluri and the Group, I do wish the Management success in all its future endeavours.

Thank you.

Yours sincerely

sgd
Rizana Mohamad Daud

(iv) the letter dated 15 April 2005 reads:

15 April 2005

Rizana Mohamad Daud
No. 2 Lorong 16/7A
Jalan 16/7
46350 Petaling Jaya Selangor

Dear Madam,

HAND OVER OF THE COMPANY'S ASSETS

I hereby acknowledge receipt the following from Encik Mohamad Sayoti on 1-5 April 2005 (5.20pm) only:

(1) Digi Sim Card (duly cut) for mobile No.016-201 8288;

(2) Toyota Camry car bearing registration No. WKS8599; and

(3) Petronas Petrol Card (duly cut).

Thank you,

Yours faithfully

LEE SZE SIANG
Executive Director

(v) the letter of demand dated 7 April 2008 reads:

Our ref: 3738/L/ST/vs

7th April 2008

The Executive Chairman
The Executive Director
Naluri Berhad,
8th Floor Menara TR
161B Jalan Ampang
50450 Kuala Lumpur

Dear Sir,

Re: Datin Rizana Mohamad Daud's Termination of Employment

1. We refer to the above matter and take note that we act for Datin Rizana Mohamad Daud.

2. We have instructed by our client that pursuant to a letter of appointment dated 7.8.2002 signed by the Executive Director of Naluri Berhad, our client was appointed as the Head of Legal/Corporate Secretarial of Naluri Berhad.

3. We have been further instructed that pursuant to the said Letter of Appointment, the effective date of Employment was the 22.1.1996. Pursuant to the Letter of Appointment and in particular clause 18 of the said letter of Appointment (a copy is enclosed for easy reference), our client is entitled to the remedies as stipulated in the Letter of Appointment.

4. Our client had by letter dated 31.1.2005 made a demand (the First letter of Demand) for you to comply and make good the remedies as stipulated in the Letter of Appointment our client stands by the contents Of the First Letter of Demand. Nevertheless, we have been instructed that to date, you have failed to make good the obligations of NaIuri Berhad to our client.

5. Take note, we have instructions from our client to notify you that in the event you fail to comply with the terms of the letter of Appointment dated 7.8.2002, within seven (7) days from the date hereof, we have strict instructions to initiate legal proceedings against Naluri Berhad, wherein all legal costs incurred in enforcing our c1ient's legal rights shall be borne by Naluri Berhad. Kindly let us have your written offer within 10 days adressed to us as solicitors for our client.

6. We look forward to your response.

Yours faithfully,

sgd
Stanley Sinnappen
For and behalf of the firm

Payment Of Compensation (Emoluments)

[14] As for the plaintiff's entitlement to the compensation which is equivalent to 36 months of the total emoluments upon the plaintiff having exercised her option to terminate the contract by tendering her resignation from the employment and upon cessation of employment, this court finds that:

(i) The plaintiff had exercised her option and her right to terminate the contract of employment by tendering her resignation as the Head of the Legal/Corporate Secretarial by giving the three months notice by the letter dated 14 January 2005 to the defendant as provided in cl. 18 of the contract of employment.

(ii) Accordingly, the plaintiff is entitled to the compensation as provided under the terms of the contract of employment upon cessation of the employment as the Head of the Legal/ Corporate Secretarial. In fact, the contract of employment expressly provides that the plaintiff shall be entitled to the compensation upon cessation of employment as the Head of the Legal/Corporate Secretarial for any reason whatsoever which included the terms and conditions as provided under (i) to (vi) of cl. 18 of the contract of employment.

[15] This court finds that there is also no evidence to support the contention on the defendant's behalf that:

(i) the plaintiff is not entitled to the compensation as she had resigned for personal reasons or resignation simpliciter.

(ii) the plaintiff's appointment as the Head of Legal/Corporate Secretarial was required to be approved by the Board of Directors.

(iii) her claim is time-barred by virtue of s. 6 of the Limitation Act 1953.

(iv) the standard terms and condition as provided in the contract of employment (exh. P19) was deliberately suppressed by the plaintiff.

(v) that the terms of the contract of employment, in particular cl. 18 was not entered *bona fide* for the benefit or to promote the prosperity of the defendant. In fact, item No. 11 of the statement of agreed facts (encl. E) expressly states that the defendant executed a letter of appointment with the plaintiff

dated 7 August 2002 subject to the terms and conditions stipulated therein. The issue of not being *bona fide* does not arise in so far as the plaintiff and it is entirely a matter between the directors and the defendant company. It cannot be imposed or taken against an employee, in the present case, the plaintiff, who has a legitimate expectation to rely that she would be paid the benefits as provided in cl. 18 of the contract of employment.

(vi) Clause 18 of the contract of employment is not opposed to public policy as provided under the Contracts Act 1950 as the defendant had not shown any illegality in so far as the terms of the contract of employment.

(vii) There is no failure of consideration as contended on the defendant's behalf as the plaintiff has indeed without any complaints from the defendant performed her part of the bargain. Accordingly, there is no basis to allege that there has been failure of consideration on the part of the plaintiff. The plaintiff is entitled to receive the benefits she had bargained for under the terms of the contract and agreed by both parties.

viii. It would be unjust to allow the defendant to go back on or against the terms of the contract of employment which has been agreed and accepted by both the parties.

[16] In essence, the foundation of the plaintiff's claim is premised on the contract of employment which was entered into between the plaintiff, and the defendant, in particular, cl. 18. Further, the plaintiff's pleaded case when considered as a whole is within the terms of the contract of employment entered into between an employer and employee and is within the four corners of cl. 18 of the contract of employment. Therefore, it is not the function of this court to rewrite the bargain of the parties and the terms of the contract of employment which the parties had agreed and that it is a well-known and well recognised legal principle. There are host of legal authorities both local and foreign which has expounded the legal principle that the court is not to rewrite the terms of the contract which the parties have agreed to be binding upon each other. In the present case, the parties had willingly entered into the contract and there is no evidence of any misrepresentation and compulsion or pressure from any third party. (see *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96; [1993] 3 MLJ 433 at p. 442, *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS

119; [1979] 2 MLJ 229 at p. 233, *Bank of Credit and Commerce International SA v. Ali* [2002] 1 AC 251 at p. 259, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at pp. 912-913, *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at pp. 267-268, *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 at pp. 532-533, *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 3 CLJ 188 at pp. 192-193, *Broome v. Pardess Co-operative Society of Orange Grows Ltd* [1940] 1 All ER 603 at pp. 610-612, *Tamplin (FA) Steamship Co Ltd v. Anglo American Petroleum Products Co Ltd* [1916] 2 AC 397 at p. 422, *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 KB 868, *Reigate v. Union Manufacturing Co Ltd and Elton Ramsbottom/Cop Dyeing Co Ltd* [1918] 1 KB 592). The doctrine of freedom and sanctity of contract, in the present case, the contract of employment must be preserved and maintained at all times.

[17] Further, by their conduct, the defendant is presently not permitted to raise or contest the plaintiff's qualification and the amount of the salary which was paid to her pursuant to the terms of the contract of employment from the time of her appointment as the Head of the Legal/Corporate Secretarial. The plaintiff had continued to hold the post as the Head of the Legal/Corporate Secretarial until she gave the three months notice of termination and the defendant had continued to pay the plaintiff's salary until she ceased employment on 14 April 2005. (see also item No. 11 of the statement of agreed facts (encl. E). There is absolutely no evidence of any objection having been raised by the previous Board of Directors and they cannot be permitted or ought not to raise lack of knowledge of the plaintiff's terms and conditions of her employment and the salary and benefits that she was receiving. Pengurusan Danaharta Nasional Berhad who took over control and management of the defendant-company on 23 December 2002 till 18 December 2004 did not also raise any objection and/or contest the plaintiff's post as the Head of the Legal/Corporate Secretarial and the salary and benefits she was receiving. Subsequently, the new Board of Directors who took over the management on or about December 2004 did not also raise any objection or had ever contested the plaintiff's position and/or the amount of salary paid to her until this action was filed in court. In fact, the defendant had continued to pay the plaintiff's salary until 14 April 2005 as the defendant must have been aware that the notice of termination would only be effective after 14 April 2005.

[18] There was also no denial or dispute by or on the defendant's behalf to the plaintiff's claim for the compensation claimed by her letter dated 14 January 2005 and 31 January 2005 and to the letter of demand dated 7 April 2008 sent through her solicitors. In fact, as stated above, by the letter dated 20 January 2005, the defendant had informed the plaintiff that the management is 'sadden' by her decision to resign in the light of the long association with the company and the renewed resolution to move forward as the company. The defendant had in fact unreservedly accepted the plaintiff's letter of termination to resign and had also wished her success and happiness in her future undertaking and did not deny her claims as provided in cl. 18 of the contract of employment which the plaintiff had requested the defendant by the said letter to settle.

[19] Indeed, there was no evidence of any complaints against the plaintiff from the management of the company or the previous Board of Directors or Pengurusan Danaharta Nasional Berhad or even the new Board of Directors with regard to her performance or of any misconduct or of any breach of the terms of the contract of employment during the course or tenure of the plaintiff's employment. It is only when the plaintiff had filed this claim in court, the Board of Directors, bearing in mind that it was a public listed company, and there are audited accounts, woke up from their 'seat' and as an afterthought and no doubt as a desperate attempt decided to unlawfully deprive and contest the plaintiff's claim for the compensation payable under the terms of the contract of employment and deny her claim by raising several defences with the view to disentitle her to this lawful claim. (see *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, *Duke of Leeds v. Earl of Amherst* (1846) 2 Ph 117, *Hogg v. Scott* LR 18 Eq 444, *De Bussche v. Alt* (1878) 8 Ch D 286 at p. 314, *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 1 MLJ 85 at pp. 95, 98-99) (see also *Kgn Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233 at pp. 236-238). The defences and the arguments raised on the defendant's behalf is merely an attempt to deprive and deny the plaintiff's legitimate claim and it must, on the facts and the surrounding circumstances in the present case, be rejected outright as having no legal basis but as an afterthought defence. This court cannot deprive the plaintiff of her entitlement to the compensation and benefits as agreed and provided under the terms of the contract of employment, in particular, cl. 18 as

A the plaintiff has the right and the legitimate expectation to enforce her rights and claim for the benefits accorded to her and agreed by both parties. The court's function is to interpret and apply the terms of the contract which the parties have made for themselves. It is not for this court to improve or alter the contract or to imply
B or include covenants which might or ought to have been expressed or included however desirable it maybe. (see *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at pp. 267-268, *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 3 CLJ 188 at p. 192, *Tindok Besar Estate Sdn Bhd v. Tinjar*
C *Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 at p. 233).

[20] This court finds that the defendant has failed to demonstrate on the balance of probabilities that the plaintiff cannot in the face of the express terms of the contract of employment, in particular,
D cl. 18, enforce her rights and benefits. In fact, the defendant did not take it upon themselves to challenge the appointment of the plaintiff as the Head of the Legal/Corporate Secretarial by filing a counterclaim, namely, to challenge the terms of the contract of employment as being not enforceable, for the reason only best
E known to the defendant, if the plaintiff did not qualify for the post as the Head of the Legal/Corporate Secretarial or the compensation as provided in the said cl. 18 as contended on the defendant's behalf. Despite the allegation in the statement of defence that the former directors of the defendant have breached
F their fiduciary duties in entering into the contract of employment with the plaintiff and that the defendant is entitled to claim for indemnity from the former directors of the defendant in respect of the plaintiff's claim, there is no counterclaim by the defendant or even a counterclaim for indemnity or third party proceeding filed
G by the defendant. On the contrary, the defendant had not only recognised and accepted the plaintiff as the Head of the Legal/ Corporate Secretarial but had also accepted the terms and conditions of the contract of employment and continued to pay her salary during the period of the three months notice of
H termination and until the three months notice of termination had lapsed on 14 April 2005. As stated above, the defendant did nothing by conduct or silence since 2005 which naturally and certainly had led the plaintiff to belief that she could safely enforce the contractual obligations as agreed by the defendant without any
I contest by the defendant.

[21] This court finds that the conduct of the defendant is inconsistent, inequitable and unjust to deprive the plaintiff of the compensation or the emoluments to which she is entitled under the terms of the contract of employment as she has a legitimate expectation to receive the compensation. Nevertheless, each cause of action is based on its own set of facts and the surrounding circumstances and may have its own strength and weaknesses but the ultimate decision of this court must be based on the set of facts and the surrounding circumstances and the contract of employment presented to the court and this court must arrive at a just decision.

[22] This court is of the considered view that the fact that the plaintiff is the wife of one of the directors and her brother-in-law was the Chairman of the defendant company is of no relevance or a decisive consideration so as to deprive or deny the plaintiff's rightful claim which is based upon the terms and conditions of the contract of employment which had been accorded to her and as claimed in the present case. The defendant's attempt to deprive the plaintiff of her contractual rights is certainly an afterthought defence.

> It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points, the judge will be capable of fashioning a winner. (see *Ling Sing Hung & Ors v. Kontiki Trading Pte Ltd* [1998] 4 CLJ 345 at p. 349 which had followed the observation of Lord Templeman in *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486 at p. 493).

[23] This court cannot provide lip service to the plaintiff's case which is essentially a claim based on the terms of the contract of employment. As stated, the fact that the plaintiff is the wife of a former director and that her brother-in-law was the former Chairman of the defendant-company should not influence this court or cloud the legal issues raised in the present case based on the terms of the contract of employment. Nevertheless, this court does not intend to suggest that matters concerning family relationship or fiduciary relationship between the directors and the company are irrelevant *per se*. However, on the facts and the surrounding circumstances and upon considering that the plaintiff's claim is based on the contract of employment between an employer and an employee and upon taking into account the doctrine of freedom of contract, the decision of this court should not be influenced with the fact that the plaintiff is the wife of the

former director and/or that her brother-in-law was the former Chairman of the defendant-company as a decisive consideration in construing the terms of the contract of employment which is the basis of the plaintiff's claim. In fact, there is absolutely no evidence that Tan Sri Saw Huat Lye, the Executive Director was under any pressure or duress or was influenced by the plaintiff's husband or the Chairman of the defendant-company to sign the contract of employment. Therefore, the defendant's complaint that the plaintiff is the wife of a former director and that her brother-in-law was the former Chairman of the defendant-company which was raised the first time after the plaintiff had filed this action in court is of no relevance to determine and construe the terms of the contract of employment. Indeed, the court's function rest on the essential judicial foundation on which the litigants strive for justice. Aside from the seemingly special provisions in the contract of employment, which the parties had agreed to be bound under the doctrine of the freedom of contract, this court cannot and would not be justified in withholding the benefits which the plaintiff is entitled as an employee of the defendant as provided in the contract of employment.

At the opening of the New Legal Year (12.10.2008), the Lord Chief Justice of England and Wales, The Rt Hon Lord Igor Judge, said:

> As Judges we have to be fair and open minded and balanced, independent in spirit, courages to do what is right even when it will be unpopular-perhaps indeed most of all when it will be unpopular-whether with politicians, the executive or the media.
>
> Decisions have to be made. There is no way in which a Judge can avoid making decisions. Moreover many of them have to be made when as a Judge or Magistrate you know that they maybe heavily criticised in the media, while you as a Judge or Magistrate know that you must live with your judicial conscience and you must do right in the face of any potential public criticism, even though this maybe deeply disturbing not only to yourself but, perhaps more important, to your spouse and family.

[24] The plaintiff has the legal right to file this action before the expiry of the six years period as provided under the Limitation Act 1953. Therefore, the fact that the plaintiff had filed this action on 6 April 2011 just about a week before the permitted last date of the limitation period cannot be held against her in order to justify

the refusal of the reliefs and interest claimed as mere delay *per se* is not a sufficient ground to disentitle the plaintiff of her rightful claim and benefits provided under the terms of the contract of employment. The plaintiff, therefore, cannot be denied the interest payment which she has claimed as the defendant had never at any time made any offer or attempt to tender the payment to the plaintiff upon the cessation of her employment on 14 April 2005, or even to pay into court. In any event, there is no evidence adduced on the defendant's behalf that the delay has prejudiced the defendant. The defendant chose not to pay the compensation which the plaintiff is entitled upon cessation of her employment despite the letters dated 14 January 2005, 31 January 2005 and the notice of demand dated 7 April 2008. Therefore, the plaintiff is entitled to claim against the defendant for interest for having unlawfully withheld the payment due to the plaintiff.

[25] It is the duty of the defendant to establish by evidence of any prejudice that has been caused as a result of the delay when the plaintiff had filed this action on 6 April 2011 or that the defendant has been put substantially in a worst position so as to enable the court to carry out a balancing exercise when considering the plaintiff's claim for the payment of interest from 15 April 2005. The plaintiff had in fact right from the time of the letter of termination dated 14 January 2005 reminded the defendant of the compensation due to her but there has been absolutely no response or denial from the defendant. There is also no evidence to support that by filing this action on 6 April 2011 which is well within the six years period or by her conduct, the plaintiff had waived her right to claim the contractual payment. This is also not a case where the plaintiff had only asserted her right to the claim for compensation for the first time when this action was filed in court. As stated above, by the letters dated 14 January 2005 and 31 January 2005, the plaintiff has reminded the defendant of the compensation payable to her but there has been no response from the defendant and the defendant had never responded or denied the plaintiff's claim until this action was filed in court. The balance of justice lies in favour of granting the reliefs claimed by the plaintiff. Accordingly, it is only just for this court exercise its discretion to award the interest as claimed against the defendant. (see s. 11 of the Civil Law Act 1956).

[26] On the issue of the Board of Directors having not approved the plaintiff's employment as the Head of Legal/Corporate Secretarial of the defendant-company, this court finds that art. 91

of the Articles of Association of the defendant-company did not require the approval of the Board of Directors to appoint the plaintiff as the Head of the Legal/Corporate secretarial as contended on the defendant's behalf. Article 91 expressly provides only with regard to the appointment of a secretary and it did not refer nor does not apply for the appointment of the plaintiff as the Head of Legal/Corporate Secretary of the defendant.

Article 91 of the Articles of Association provides that:

> The Secretary, shall be appointed by the Directors for such term or terms, at such remuneration and upon such conditions as they may think fit, and any Secretary so appointed may be removed by them. The Directors may, from time to time, appoint two or more persons as joint Secretaries and if there is no Secretary or no Secretary capable of acting, by resolution appoint an assistant or Deputy Secretary to exercise the functions of the Secretary.

[27] It is an unconscionable conduct on the part of the defendant to wake up at their leisure and convenience at this late stage and attempt to deprive or deny the plaintiff of her rightful claim by raising their dissatisfaction only after the plaintiff had filed this action in court on 6 April 2011. Despite the admitted facts that the plaintiff had by her letter dated 14 January 2005 and 31 January 2005 reminded the defendant of the compensation and her entitlement under the terms of the contract of employment, the defendant had not denied or disputed the plaintiff's claim until this action was filed in court on 6 April 2011. In fact, as stated above, the defendant had continued to pay the plaintiff her salary for the months of January, February and March 2005 (see exh. P5A-C) and the plaintiff's driver's wages for the month of April 2005 which is also reflected in the Income Tax Form EA (see exh. P22) that she had ceased employment on 30 April 2005. Impliedly, the successors or the present Board of Directors had approved the plaintiff's employment and her position as the Head of Legal/Corporate Secretarial and the terms of the employment as contained in the contract of employment dated 7 August 2002. It is important to state for the purpose of completion that the defendant had previously attempted to strike out the plaintiff's claim by filing an application on the ground that the plaintiff's claim was time-barred. However, this court had dismissed the application on 4 October 2011 as the facts and the surrounding circumstances of the case did not justify for summary disposal of the plaintiff's claim as the court found that it required *viva voce* evidence to decide on the issue of limitation.

[28] This court also finds that there is no requirement or obligation in the contract of employment for either party to give reasons for the termination of the contract of employment. (See *American International Assurance Company Ltd v. Koh Yen Bee* [2002] 4 CLJ 49 at pp. 61-62, 68). The plaintiff did not state in the letter of termination dated 14 January 2005 that her resignation was due to personal reasons. In fact, the plaintiff has by the letter dated 31 January 2005 in response to the defendant's letter dated 20 January 2005 refuted the defendant's assumption that her intention to resign was for personal reason. However, the fact remains that the defendant had unreservedly accepted the plaintiff's notice of resignation dated 14 January 2005 by their letter dated 20 January 2005 when the plaintiff had exercised her right to terminate the contract of employment by tendering her resignation to the defendant.

[29] The rule of public policy as raised on the defendant's behalf does not apply to the facts and the circumstances in the present case to disentitle the plaintiff or to invalidate the appointment or the emoluments payable to the plaintiff. In the present case, the defendant had never contested the terms of the contract of employment or had ever disputed or denied the plaintiff's salary and benefits or the compensation as provided in cl. 18 from the time the plaintiff was employed as the Head of Legal/ Corporate Secretarial or even at the time when the plaintiff had given notice of termination by the letter dated 14 January 2005 and reminded the defendant of the compensation that is payable to her. The objection was raised for the first time by the defendant that she is not entitled for the compensation after this action was filed in court on 6 April 2011. The defendant is not permitted as an afterthought to deprive the plaintiff of her claim only when the action was filed in court on 6 April 2011. If the plaintiff desires this court to rewrite the terms of the contract of employment and if the same is entertained by this court, it will only give rise to employment chaos and would not be a conscionable exercise in the private sector but rather endanger the sanctity of the freedom of contract so long it does not contravene the Contracts Act 1950. The duty of the court is to administer and serve justice in accordance with the facts presented to the court and in the present case, this court is satisfied that the plaintiff deserve justice which ought to be granted in her favour. Having regard to the surrounding circumstances in respect of the plaintiff's claim for her benefits as provided under the contract of employment and pursuant to her letter of termination dated 14 January 2005

handed to the defendant and acknowledged by both parties, a reasonable man, as in the case of the defendant, would expect the defendant, acting honestly and responsibly to take steps immediately to make their stand or objection known to the plaintiff but the defendant remained silent and continued to pay the plaintiff's salary under the contract of employment and until she ceased employment on 14 April 2005. (See exh. P5A-C).

[30] As stated above, this court should not interfere and take upon itself to rewrite the terms and conditions of the contract of employment entered into between the defendant-employer and the plaintiff-employee. The defendant, therefore, cannot be permitted to frustrate the contract of employment as both parties have agreed, accepted and affirmed the terms of the contract of employment without any contest, protest or objection until the plaintiff had filed this action in court. In the circumstances, this court rejects all the defences put forward on the defendant's behalf and raised through cross-examination of the plaintiff at the trial which was basically to deprive the plaintiff of her contractual entitlement as the contract of employment must be construed in accordance with the expressed intention of the parties. On the factual matrix and the surrounding circumstances in the present case, the language or the words and the terms of the contract of employment executed for valuable consideration must be construed as far as possible, in favour of the plaintiff employee. The contract of employment must be read and construed in accordance with the expressed intention of the parties to the said contract of employment.

[31] As for the issues to be tried at the trial of this action, the decision of this court is as follows:

Issue No. 1	-	Negative
Issue No. 2	-	Negative
Issue No. 3	-	In view of the answer to Issue No. 2 being in the negative, the Issue No. 3 is irrelevant as there was no requirement under the law for the plaintiff's appointment to be approved by the Board of Directors of the defendant
Issue No. 4	-	Negative
Issue No. 5	-	Affirmative

Issue No. 6	-	Negative
Issue No. 7	-	Any advantage, profit or gain received as a result of one's employment or one's holding of office. (see *Director General of Inland Revenue v. R* [1975] 1 LNS 32 and *Pritchard v. Arundale* [1971] 3 All ER 1011)
Issue No. 8	-	Negative
Issue No. 9	-	Affirmative except for the post judgment interest which would be in accordance with the Rules of the High Court 1980

[32] Having examined and considered the totality of the evidence, and in particular the terms of the contract of employment which was freely entered into between the defendant and the plaintiff, both oral and the contemporaneous documents and the statement of agreed facts, this court is satisfied that the plaintiff has on the balance of probabilities successfully demonstrated and established the claim that she is entitled to the compensation as provided in cl. 18 of the contract of employment upon cessation of her employment.

[33] In accordance with the rules of reason and justice, the plaintiff's claim is allowed with costs. Prayer (i) is to be assessed by the Registrar (O. 37 r. 1 of the RHC 1980). Prayer (ii) is allowed. Prayer (iii) is allowed. Prayer (iv) is allowed on the assessed amount at the rate of 8% per annum from 15 April 2005 until the date of judgment and thereafter at the rate of 4% on the judgment sum till the date of satisfaction.